(1)

88-117

No._____

Supreme Court, U.S.
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In The

# Supreme Court of the United States

October Term, 1987

TONY AND SUSAN ALAMO FOUNDATION,

*Petitioner*

v.

CHARLES D. RAGLAND, COMMISSIONER OF THE DEPARTMENT OF FINANCE AND ADMINISTRATION, AND THE STATE OF ARKANSAS DEPARTMENT OF FINANCE AND ADMINISTRATION,

*Respondents*

**ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARKANSAS**

## PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARKANSAS

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## QUESTIONS PRESENTED

1. Is the application of the Arkansas Gross Receipts Act (sales tax) to noncommercial internal transfers of food, clothing and other necessities to associates of the petitioner and their families violative of the Free Exercise of Religion Clause and/or the Establishment Clause of the First Amendment to the United States Constitution.

2. Does the scheme of exemptions to the Arkansas Sales Tax discriminate in favor of a few enumerated charitable institutions to the exclusion of the Petitioner and other church and/or charitable institutions such as to deny due process and equal protection of law as provided by the Fourteenth Amendment to the United States Constitution.

3. Is the application of the Arkansas Gross Receipts Act to Petitioner a willful and oppressive denial of equal protection of the law secured by the Fourteenth Amendment to the United States Constitution.

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No.———

In The
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TONY AND SUSAN ALAMO FOUNDATION,

*Petitioner*

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CHARLES D. RAGLAND, COMMISSIONER OF THE DEPARTMENT OF FINANCE AND ADMINISTRATION, AND THE STATE OF ARKANSAS DEPARTMENT OF FINANCE AND ADMINISTRATION,

*Respondents*

## ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARKANSAS

## PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARKANSAS

## OPINIONS DELIVERED BELOW

The Decree of the Chancery Court of Crawford County, Arkansas, is unreported and printed in its entirety

in Appendix A hereto. The Opinion of the Supreme Court of the State of Arkansas is reported at 295 Ark. 12, — S. W. 2d — (1988) and is printed in its entirety in the Appendix B hereto.

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## GROUNDS UPON WHICH JURISDICTION IS INVOKED

The Opinion of the Supreme Court of the State of Arkansas was delivered on March 14, 1988 (*See* Appendix B.) The Petitioner filed a timely Petition for Rehearing, which was denied by Order of the Supreme Court of the State of Arkansas on April 18, 1988 (*See* Appendix, Page App. B). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257 (3).

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## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

### Constitutional Provisions

U.S. Const. Amend. I. Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U. S. Const. Amend. V. No persons shall be . . . deprived of life, liberty, or property, without due process of law . . .

U. S. Const. Amend. XIV.

Section 1 . . . nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

**Statutes**

United States Internal Revenue Code, § 501(c)(3)

Ark. Code Ann. § 26-18-406

Ark. Code Ann. § 26-52-103(3)(A)

Ark. Code Ann. § 26-52-301(1)

Ark. Code Ann. § 26-52-401(2) & (3), (8), (9), (10) & (11)

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*Matthew* 25:31-46

(Only the Citation for the above list of statutes is provided at this point; their pertinent text is set forth in Appendix C).

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## STATEMENT OF THE CASE

1. *Facts Material to the Consideration of Questions Presented.* The Tony and Susan Alamo Foundation, was founded by Tony Alamo, and his wife, Susan Alamo, now deceased, and was incorporated as a non-profit corporation under the laws of the State of California on January 29, 1969. Subsequent to its incorporation, the Foundation applied for, and received, a certificate of authority to conduct its affairs as a non-profit corporation in the State

of Arkansas. On December 18, 1974, the Foundation secured an exemption from taxation under § 501(c)(3) of the Internal Revenue Code as a corporation organized and operated exclusively for religious purposes with none of its net earnings inuring to the benefit of any private shareholder or individual (*See,* Plaintiff's Exhibit 2; R. 230).

The Commissioner did not contest the status of the Foundation as a church or charitable institution (R. 30). Among other things, the Petitioner Foundation is organized to establish and maintain an evangelistic church, to conduct religious services, to minister to the sick and needy, to care for the followers, to rescue the fallen, and generally to do those things needful for the promotion of the Christian faith, virtue and charity. Additionally, the Foundation was organized for the purpose of conducting Bible schools, organizing churches and missions, to educate, ordain, support and appoint ministers, evangelists, missionaries and workers in connection therewith. The Foundation is organized to carry on education and other charitable and non-profit projects related to welfare and benevolent work among the poor and needy (R. 236-8).

The activities or entities involved in the instant litigation consist of the following: Alamo of Nashville in Alma; Alamo Restaurant; Alamo Kerr-McGee and Quicki-Mart; Alamo Auto Repair and Transmission; Alamo County Store and Fruit Store; and, Alamo DX Service Station, all located in Alma, Arkansas. Each of these entities obtained a sales tax permit and paid the Arkansas Gross Receipts (sales) tax [Ark. Code Ann. § 26-52-301(1)] on all transactions involving persons or firms not associated with the Foundation, i.e., the general public. The sales tax assessment in the instant case involves

the transfer of various foods, clothing, gasoline, auto repairs, and other necessary items to associates within the Foundation and their families for the audit period of September 1, 1977 to August 31, 1980.

Foundation activities are performed by approximately 300 individuals who are generally referred to as "Associates". Prior to their association with the Foundation, most were addicted to or abusers of drugs and/or alcohol or engaged in some criminal activity. The Associates, however, are only a fraction of the people who have been converted, encouraged, or assisted by the Foundation.

The amount of tax assessed (3%) during the audit period of September 1, 1977 to August 31, 1980 is as follows:

| Entity | Due | Tax | Penalty | Interest |
|---|---|---|---|---|
| Alamo/Alma | 2,634.14 | 1,775.61 | 182.76 | 675.77 |
| Restaurant | 43,487.08 | 28,690.34 | 2,869.03 | 11,927.71 |
| Kerr-McGee | 1,985.20 | 1,321.44 | 132.14 | 531.62 |
| Auto Repair | 11,085.10 | 7,802.07 | 780.21 | 2,502.82 |
| Country Store | 3,464.40 | 2,294.87 | 253.50 | 916.03 |
| DX | 3,422.72 | 2,344.05 | 234.41 | 628.43 |
| | 66,078.64 | 44,228.38 | 4,482.05 | 17,681.38 |

As to the Alamo Restaurant, the gross value of sales and/or transfers (both internally and with the general public) derived from the activities listed above exceeded $2.3 million. The value of the transfers of food from the Restaurant to associates and their families was approximately $956,345, with $1.4 million to the general public (R. 350-1). The Petitioner paid sales tax on the $1.4 million. The Commissioner contends that the internal transfers ($956,345) are taxable sales within the meaning of

Ark. Code Ann. § 26-52-103(3)(A) & (4), and not subject to exemption as a church or charitable institution under Ark. Code Ann. § 26-52-401(2) & (3) because the Foundation was allegedly transacting business for profit with the public.

The Petitioner contends that the above listed activities are extensions of the Foundation's ministries and that they provide the associates an evenue for rehabilitation and a forum for the dissemination of their religious beliefs. Consequently, each activity is viewed by the associates as church and rehabilitation activity. In addition, these activities serve the needs of the Associates and their families. For example, the restaurant provides, without charge, meals to the associates and their families, as the clothing store freely provides clothing.

The Commissioner contends that because these activities also sell items to the general public for a price over the wholesale value, the Foundation is an "organization . . . engaged in business for profit", and not entitled to an exemption as a church or charitable institution. The Foundation paid sales tax, however, on all transactions with the public at large. It is the internal transactions of the transfer of necessities of food, clothing, etc., to the Foundation associates and families, that are the subject of the instant sales tax assessment to which the Foundation strenuously objects.

The overwhelming majority of the work performed in the operation of these activities is done by the Associates. Most of the Associates' time, however, is spent in religious activities such as Bible study, teaching and witnessing to others. The evidence was undisputed that the Foundation was a non-profit corporation, performing its functions as a church by the efforts of individual volun-

teers. The associates received benefits from the Foundation in the form of lodging, meals, medical care, clothing, furnishings, child care, automobile repairs, and etc.

The Commissioner contends, and the Supreme Court of the State of Arkansas so held, that the transfer of such necessities from the Foundation to the associates and its families were benefits the Foundation received in exchange for the associates' services in the Foundation activities, and that therefore, such transfers were sales. It also determined that since the Foundation admittedly sold items to the public at large over and above wholesale value, that it was in business for a profit, and therefore not entitled to an exemption as a church or charitable institution as to internal transfers of necessities to Foundation associates and their families. It rejected the constitutional arguments advanced by Petitioner.

2. *Procedure Below.* (Including Basis for Jurisdiction) On October 27, 1983, the Petitioners filed suit in the Chancery Court of Sebastian County, Arkansas, for the purpose of judicial review of the Administration Decision by the Department of Finance and Administration of the State of Arkansas as provided by Ark. Code Ann. § 26-18-406. The Administrative Decision, No. 81-108 issued August 5, 1983, denied exemptions claimed by Petitioner as a church and rejected the Petitioner's constitutional arguments (R. 26-33). After completion of discovery, a hearing was held before the Chancellor on March 3, 1986, from which the Chancellor affirmed assessment of sales tax against Petitioner as to the internal transfers within the subject activities (R. 370-2). The Decree entered on September 16, 1986, specifically stated that the tax was not a violation of the Federal and State Constitutional rights to

due process, equal protection and freedom of religion (R. 196-7). The Chancellor also determined that the transfer of food from the Alamo Restaurant to the Foundation headquarters located at Dyer, Arkansas, during the tax period, retail value of $344,349.52, would be assessed at the actual wholesale value *(Id.)*. All other internal transactions were to be taxed upon the retail value of the food, clothing, etc.

On October 15, 1986, the Petitioners, seeking reversal of the Chancellor's decision, filed a Notice of Appeal to the Supreme Court of the State of Arkansas. On October 27, 1986, the Respondent filed a Notice of Cross-Appeal, seeking to reverse the Chancellor on the question of assessment of tax on the wholesale value of foods withdrawn and consumed at the Foundation headquarters.

After considering the parties' brief and oral argument, the Supreme Court of the State of Arkansas, on March 14, 1988, rendered its Opinion affirming the assessment of the sales tax and reversing the Chancellor's holding that the withdrawal of food should be taxed at wholesale value. The majority opinion specifically rejected Petitioner's contention as to a violation of the freedom of religion, equal protection and due process clauses of the United States Constitution. Justice Purtle, in his dissent, opined there to be unconstitutional discrimination against Petitioner because of disagreement with the manner in which Petitioner carried out its religious beliefs.

The Petitioners filed a Petition for Rehearing in a timely manner, which was denied on April 18, 1988, by the Supreme Court of the State of Arkansas.

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## REASONS FOR THE ALLOWANCE OF THE WRIT

### (Rule 17 of the Rules of the Supreme Court)

**1. Decision in Conflict with the Decision of this Court and with Decisions of Other State Courts of Last Resort.**

The sales tax assessment in the instant litigation includes transfers of various prepared foods left over from the Alamo Restaurant, clothing from the clothing store, gasoline and automobile repairs, and other necessities to the actual beneficiaries of the Foundation, i.e., the associates within the Foundation and their families. Specifically, as to food prepared by the Alamo Restaurant, approximately 26% was consumed by the Associates of the Foundation Activities. About 14% of the total food consumed was distributed to associates and families at the Foundation headquarters in Dyer, Arkansas (R. 350-1, 369). When the Foundation began these various activities, it obtained a sales tax permit. During the period in question, the Foundation paid actual sales tax on approximately $1,400,000.00 worth of transactions with the general public as to the Alamo Restaurant alone.

It was undisputed at trial that the Foundation was a non-profit corporation recognized by the State of Arkansas. The witness for the Commissioner/Respondent testified, concerning the restaurant business, that it was obviously not a business engaged so as to make a profit (R. 362-3). The unrebutted evidence at trial was that the Foundation was primarily engaged in the business of assisting and providing the necessities of life to the Associates and their families while ministering to their religious and spiritual needs. The mere fact that the Foundation sold items to

the general public at a price over and above the wholesale cost in order to fund the religious and charitable activities for which it was organized, does not mean that the Foundation's providing of food, clothing and other necessities to the associates and their families is a commercial activity or that the Foundation is an organization engaged in business for a profit. One of the primary purposes of the Foundation, in ministering to the needs of its associates and families, is the full-time training and rehabilitation of the associates as spiritually mature Christians and productive members of society. The respondents seek to add the additional burden of a sales tax to the internal religious transactions of the Foundation of providing the necessities of life to the beneficiary/associates of the Foundation while it is in the process of ministering to their spiritual needs in the rehabilitation process.

Here, the respondent seeks to tax one of the religious/beneficent activities of the Foundation for which it is formed and is fostering (i.e., the provision of the necessities of food, clothing and shelter to the associates and their families while being rehabilitated and trained in the various religious aspects of the organization). No one contests that the instant activities (a restaurant, clothing store, gas station, etc.) would be traditionally characterized as commercial in nature; the question, however, is what transfers within those activities will be subject to the sales tax. We submit that it is only those transactions that do not encompass the religious/charitable objectives of the Foundation that would be subject to the sales tax. As to those non-internal transactions, the sales tax has long since been paid. The taxing of clearly internal

transactions within the Foundation seriously frustrates the ability of the Foundation to minister to the associates and their families and thereby effectuate its religious function.

Moreover, the taxation of these transactions fosters excessive government entanglement with the internal workings of Petitioner as a church attempting to evangelize others and minister to their basic needs. One such obvious area is the detailed record keeping of all such activities, such records being subject to constant review by the Commissioner. *See* Ark. Code Ann. § 26-52-501(b) & (c). Arguably, if the transaction involving the distribution of necessaries to Foundation beneficiaries is a sales tax transaction requiring both the payment of the tax and the record-keeping of the transaction, then arguably, the transfer of funds or property by any church to its beneficiaries, a traditionally religious/eleemosynary "transaction," will be subject to the sales tax. Most churches and charitable organizations make some "profit" (funds over and above cost) on their suppers, bazaars, rummage sales and other similar activities, but few, if any, would ever claim his church was an organization engaged in business for profit. Granted, the Foundation has relied more than most churches on traditionally "commercial" activities to finance its religious activities, but this does not change its basic character as a church. More importantly, it does not transform the provision of necessities to the needy, a basic Christian religious activity since Jesus declared such in the Olivet discourse (*Matthew* 25:31-46), into a secular event.

We submit, ultimately, that churches and other church-related activities will be excessively entangled with

government regulation in areas involving the basic religious functions of those churches. Such a relationship is prohibited by the First Amendment of the United States Constitution, and should not be countenanced by this Honorable Court. This Court has previously stated in *Murdock v. Commonwealth of Pennsylvania*, 319 U.S. 105, 63 S.Ct. 870, 87 L.Ed.1292 (1943).

> Situations will arise where it will be difficult to determine whether a particular activity is religious or purely commercial. The distinction at times is vital. . . . But the mere fact that the religious literature is "sold" by itinerant preachers rather than "donated" does not transform evangelism into a commercial enterprise. If it did, then the passing of the collection plate in church would make the church service a commercial project. The Constitutional rights of those spreading their religious beliefs through the spoken and printed word are not to be gauged by standards governing retailers or wholesalers of books. . . . *It is plain that a religious organization needs funds to remain a going concern.* But an itinerant evangelist, however misguided or intolerant he may be, does not become a mere book agent by selling the Bible or religious tracts *to help defray his expenses or to sustain him.* Freedom of speech, freedom of press, freedom of religion are available to all, not merely to those who can pay their own way. As we have said, the problem of drawing the line between a purely commercial activity and a religious one will at times be difficult. . . . We do not mean to say that religious groups and the press are free from all financial burdens of government. . . . The power to tax the exercise of a privilege is the power to control or suppress its enjoyment (Citation omitted). *Those who can tax the exercise of this religious practice can make its exercise so costly as to deprive it of the resources necessary for its maintenance.* Those who can tax the privilege of engaging in this form of missionary evangelism can close

> its doors to all those who do not have a full purse. Spreading religious beliefs in this ancient and honorable manner would thus be denied the needy. Those who can deprive religious groups of their colporteurs can take from them a part of the vital power of the press which has survived from the Reformation period. . . .

Id., 319 U.S. at 110-3. The respondent contends that the decision of this Honorable Court in the *Tony and Susan Alamo Foundation vs. Secretary of Labor*, 471 U.S. 290, 105 S. Ct. 1953, 85 L.Ed.2d 278 (1985), mandates a similar result in this case. The respondent contends that the application of the sales tax to these transactions does not violate the First Amendment of the United States Constitution because this Court rejected a similar argument when it applied the Fair Labor Standard Act to the Foundation. In that case, however, this Court indicated that the Fair Labor Standard Act would only apply to "commercial activities undertaken with a business purpose" *Id.* at 471 U.S. 304. The Commissioner fails to note that this Court's opinion clearly states that the Fair Labor Standard Act did not apply to Associates working in non-commercial activities and in the non-commercial religious activities of the organization. Here, the activity which is sought to be taxed is one of the religious activities for which the Foundation was formed and is fostering, i.e., the provision of necessities of food, clothing and shelter to the Associates and their families while being spiritually rehabilitated. The taxing of the clearly internal religious activities within the Foundation is a violation of the First Amendment to the United States Constitution. *See Arkansas Writers' Project, Inc. v. Ragland*, — U.S. —, 107 S.Ct. 1722, 95 L.Ed.2d 209 (1987).

Additionally, the decision of the Arkansas Supreme Court is in conflict with the decisions of several sister states. *See Bes Corp. v. Tully*, 403 N.Y.S.2d 342 (1978); *Kollasch v. Adamany*, 104 Wis.2d 552, 313 N.W.2d 47 (1981); *Maumee Valley Broadcasting Association v. Porterfield*, 29 Ohio St.2d 95, 58 Ohio Ops.2d 192, 279 N.E.2d 863 (1972); *Security Life and Acci. Co. v. Heckers*, 495 P.2d 225 (1972, Colo.); *R. C. Mahon Co. v. Department of Revenue*, 306 Mich. 660, 11 N.W.2d 280 (1943); *Briggs v. Page*, 221 N.Y.S.2d 843 (1961); *Sunday School Board of the Southern Baptist Convention v. Evans*, 192 Tenn. 495, 241 S.W.2d 543 (1951); *State v. Daalan*, 69 S.D. 466, 11 N.W.2d 523 (1943). *But See* Exemption of Religious Organization from Sales or Use Tax, 54 A.L.R.3d 1204, 1208.

Ark. Code Ann. § 26-52-401(2) & (3) provides for an exemption from sales tax for all sales *by* a church or charitable organization except if engaged in business for profit. The Chancellor determined that all internal transactions by the Petitioner except the dissemination of food to associates and their families at the Foundation headquarters at Dyer should be taxed at the retail value. Those internal transfers of food to the associates and their families at the Foundation headquarters at Dyer were to be taxed at the wholesale value. In essence, the latter was a tax on the value of the product at its purchase by or sale *to* Petitioner. Ark. Code Ann. § 26-52-401(8), (9), (10), (11), provide for exemptions from the sales tax for transfers *to* such charitable organizations as the Boy Scouts of America, Girl Scouts of America, Boys Clubs of America, Girls Clubs of America, the Poets Roundtable of Arkansas, the 4-H Clubs, and F.F.A. Clubs, among

others. There is absolutely no rational basis for treating them differently from churches or other charitable institutions. The Arkansas Gross Receipts Acts, by virtue of the schematic of its exemptions, discriminates against the Petitioner and other churches and charitable organizations in favor of a few enumerated charitable organizations. The Commissioner took the position that sales tax was due on transfers *by* the Foundation because no tax had been paid on sales *to* the Foundation, i.e., the Foundation had purchased the food, etc., free of sales tax. The Commissioner claims that since Petitioner paid no sales tax when it purchased the items at wholesale value, it must pay sales tax when the items are later transferred to Associates and their families at retail value. To put it another way, the Commissioner would have assessed no tax had Petitioner paid sales tax at the time of purchase. Under the present statutory scheme this position is viable because only the specifically listed organizations are exempt from sales tax on purchases *by* them. *Id.*

As mentioned above, the end result of the Chancellor's determination as to the transfer of food to the Foundation headquarters at Dyer, was to tax the transfer of that food *to* the Petitioner. The above statutory exemptions as to sales *to* the Boy Scouts of America and others is special legislation for the few organizations listed with no rational nexus for the classification. These exemptions do not make the "business for profit" distinction as its counterparts do in Ark. Code Ann. § 26-52-401(2) and (3). There is absolutely no rational basis for treating the Poets Roundtable of Arkansas discriminately different from the First Methodist Church of Little Rock or the Petitioner Foundation of Alma. *Hardin v. Vestal*, 204 Ark. 492, 162

S.W.2d 923 (1942). Such a statutory scheme is basically unfair and not rationally related to the purposes intended. The Constitutional guarantee of equal protection of the law applies both to privileges conferred and liabilities imposed, *Hartford Steam Boiler Inspection and Ins. Co. v. Harrison*, 301 U.S. 459, 57 S.Ct. 838, 81 L.Ed.2d 1223 (1937), and includes within its purview exemptions from liabilities. *See Cotting v. Goddard*, 183 U.S. 79, 22 S.Ct. 30, 46 L.Ed. 92 (1901).

The Commissioner admitted it had not sought to audit any other church or charitable organization other than Petitioner, for the purpose of assessing sales tax, albeit others were known to engage in similar "profit-making" activities (R. 316-7, 325, 332-9). Petitioner has been singled out by the Commissioner to the exclusion of other religious institutions for assessment and levying of the sales tax. Such selective enforcement is violative of the Equal Protection Clause of the United States Constitution.

**2. Effect of Decision on Volunteerism and Religious Freedom in This Country.**

The Decision of the Supreme Court of the State of Arkansas will impact volunteerism and religious freedom in this country. The Chancellor made no finding in regard to the voluntary nature of the services of the associates, but merely indicated that the activities were operated for profit. The Supreme Court opined that from the activities the Petitioner provided substantial goods and services to its associates and its families. It also denominated the associates as "employees" of the businesses and other operations of the Petitioner, citing *Tony and Susan*

*Alamo Foundation v. Secretary of Labor, supra.* It also found the associates received no salaries, and that all or substantially all of their material needs are met by the businesses and other endeavors of the Petitioner, to include the essentials of life: food, clothing and shelter.

The Commissioner, through this case, expresses a disdain for the volunteer efforts of the associates of the Petitioner. He argued that an unfair advantage over competitors would be created in favor of the Petitioner, if such transactions are exempted from sales tax application. This argument has no support in the record, which clearly reflect that the entities involved operated at a loss and could not unfairly compete for the business of the general public, inasmuch as Petitioner also paid sales tax on those transactions. Furthermore, the Commissioner argues that application of the sales tax does not affect the volunteer efforts of the Petitioner, or of the ability of the associates to exercise their religious freedoms. This argument presupposes that religious activities or practices are limited to the mere singing of hymns, studying of the Bible, or of listening to the preacher on Sunday, when to most who are involved in Christian ministries, meaningful religious activities continue on a daily basis with the providing of the physical necessities of those in need, as well as their spiritual education.

The application of the Arkansas Gross Receipts Act upon the Foundation and its activities will contribute substantially to the demise of this Christian endeavor. In addition, it will open a door heretofore closed to the Commissioner, to impose such burdensome financial record keeping requirements upon other Christian ministries,

which will inevitably hinder or restrain their religious and charitable efforts. It is commonplace for religious and charitable organizations to utilize the assistance of volunteers in activities traditionally characterized as "commercial" in order to further the religious/eleemosynary purposes of the organizations. Until now, such activities in Arkansas have not been subject to the imposition of the sales tax on those internal activities involving the transfer of the necessities of life to the beneficiaries of those organizations.

The Decisions below create serious First Amendment concerns, as previously discussed, the inevitable result will be the entanglement of government regulation with religious activity. Furthermore, the taxing of such religious activities will materially impair the ability of such activities to financially continue.

The importance and impact of this decision warrant the granting of the Petitioner's request for a Writ of Certiorari to the Supreme Court of the State of Arkansas.

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## CONCLUSION

WHEREFORE, Petitioner prays that a Writ of Certiorari issue from this Honorable Court to review the decision of the Supreme Court of the State of Arkansas. In the event that the Writ is granted, the Petitioner prays that the Decision of the Court below be reversed.

Respectfully submitted,

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## APPENDIX A

STATE OF ARKANSAS
DEPARTMENT OF FINANCE AND
ADMINISTRATION
REVENUE DIVISION

OFFICE OF HEARINGS AND APPEALS

IN RE: TONY AND SUSAN ALAMO FOUNDATION, INC.

Gross Receipts Tax
No. 81-101

ADMINISTRATIVE DECISION

Tony and Susan Alamo Christian Foundation, Inc.

Gross Receipts Tax
NO. 81-108

This opinion is rendered as a result of a hearing held on July 15, 1981, pursuant to the Arkansas Tax Procedure Act. The taxpayer was represented by Mr. Roy Gean, Jr., Attorney at Law, and the Department of Finance and Administration was represented by Mr. Joseph V. Svoboda, Attorney, Office of Legal Services.

The issue before the Board is whether various transactions of the six noted businesses which are owned and operated by the Tony and Susan Alamo Christian Foundation, Inc., are exempt from the gross receipts tax. From the evidence presented to the Board, Tony and Susan Alamo Foundation, Inc., which is hereinafter referred to as "Foundation", operates at least twenty separate businesses within the general area of Fort Smith, Arkansas. A general description of the transactions in issue for each of the six noted businesses follows:

(1) *Tony and Susan Alamo Christian Foundation, Inc. d/b/a Alamo Auto Repair and Transmission:* This audit involves charges for parts and services in connection with the repair of vehicles owned and operated by the various business entities of the Foundation. The parts used in these repairs were not taxed at the time of purchase from the producer but were purchased by the taxpayer for resale purposes. The labor charges involved were assessed under authority of Ark. Stat. Ann. (1903 (c)(3) which states generally that "there is hereby levied an excise tax of 3 per centum upon the gross proceeds or gross receipts derived from all sales to any person . . . of the . . . service of alteration, addition, cleaning, refinishing, replacement and repair of motor vehicles . . . "

(2) *Tony and Susan Alamo Christian Foundation, Inc., d/b/a Alamo Country Store and Fruit Stand.* This audit concerns the distribution of various food stuffs from this particular business entity to the employees of the other business entities of the Foundation and in turn consumed by those employees. Rather then make a payment directly to this entity for the value of the foodstuffs the employees made donations to the Foundation and the foodstuffs were provided to the employees in exchange for the cash donations. These "exchanges" were assessed as withdrawals from stock under authority of Ark. Stat. Ann. 84-1902(d) which states generally that the term "gross receipts" or "gross proceeds" means the total amount of consideration for the sale of tangible personal property . . . whether the consideration is in money or otherwise . . . (and) shall include the value of any goods, wares, merchandise, or property withdrawn or used from the established business or from the stock

in trade of the established reserves for consumption or use in such business or by any other person.

3. *Tony and Susan Alamo Christian Foundation, Inc., d/b/a Alamo of Nashville in Alma, Arkansas.* This audit concerns clothing purchased by this particular business entity for resale, but instead delivered to the employees of the various business entities of the Foundation in exchange for cash donations. These transactions are treated as withdrawals from stock under authority of Ark. Stat. Ann. 84-1902(d) as stated generally above and the State also cites in support of this particular assessment Ark. Stat. Ann. 84-1902(c) which defines the term "sale" to mean "the transfer of either the title or possession . . . for a valuable consideration of tangible personal property, regardless of the manner, method, instrumentality or device by which such a transfer is accomplished . . . (and is) "to include the exchange, barter, lease, or rental of tangible personal property."

4. *Tony and Susan Alamo Christian Foundation, Inc. d/b/a Alamo DX Service Station:* This audit involves the transfer of tires, batteries, and other auto accessories from this particular business enterprise to other business entities owned by the Foundation. The items in issue were purchased by this entity for resale, but in fact were transferred to the other Foundation entities for consumption without payment of any tax. The State cites as authority for this assessment Ark. Stat. Ann. Sec. 84-1902(d) which is quoted above.

5. *Tony and Susan Alamo Christian Foundation, Inc. d/b/a Alamo Restaurant:* This audit concerns foodstuffs purchased by this business entity for resale and

subsequently furnished to employees of the other various entities of the Foundation for consumption. The State contends that this is a withdrawal from stock and cites Ark. Stat. Ann. 84-1902(d) as authority which is quoted above.

6. *Tony and Susan Alamo Christian Foundation, Inc. d/b/a Alamo Kerr McGee Gas & Quickie Market:* This audit concerns a business operation which is primarily a service station but which also acts as a small convenience type store that sells various products such as cakes, candy, sandwiches, belts, hats, etc. The items in issue were purchased by the business entity for resale but instead were provided to employees of the Foundation and to other business entities of the Foundation, sometimes in exchange for cash donations made to this particular entity, for consumption by the recipient of the goods without payment of a sales or use tax. The State contends that each transaction involves a withdrawal from stock and is a taxable sale under authority of Ark. Stat. Ann. Sec. 84-1902, subsections (c) and (d) which are quoted above. The taxpayer's contentions are threefold: first, that it is a recognized "church" and is entitled to the exemption from sales and use taxes as set out in subsections (c) and (d) of Ark. Stat. Ann. Sec. 84-1904; second, that the exchanges involved between the employees and the business entities are "donations" not subject to sales or use tax; and third, that application of the sales and use taxes to the transactions in issue constitute a violation of the taxpayer's rights to equal protection under state and federal law.

The particular language of the exemptions cited by the taxpayer is found at Ark. Stat. Ann. Sec. 84-1904, the pertinent parts of which read as follows:

> There is hereby specifically exempted from the tax imposed by this Act the following:
>
> (c) the gross receipts or gross proceeds derived from the sale of tangible personal property or services by churches, except where such organizations may be engaged in business for profit.
>
> (d) the gross receipts or gross proceeds derived from the sale of tangible personal property or services by charitable organizations, except where such organizations may be engaged in business for profit.

Although the State does in fact contest the status of the taxpayer as a church or charitable institution, we are not called upon to decide that question because we agree with the main argument presented by the State which is that the activities in dispute are outside any "church" or "charitable" framework of the entity involved. It is our understanding and interpretation of the legislation and the case law applicable that in order for the exemption to apply the activity alleged to be exempt must be closely related to the central function of the exempt organization. For example, the activities involved in the operation of a cafeteria located within a hospital complex certainly do facilitate the charitable function of the hospital itself. However, if the hospital administration chose to open a cafeteria across town and not immediately essential to the operation of the hospital then that would raise serious doubts about the application of the exemption to the secondary activity. Certainly, not all of the feasible endeavors of a church or of a charitable organization are neces-

sarily immune from profit motives, at least in the mind of the Arkansas Legislature. Specifically, the Legislature in the above noted statute said that the church and charitable exemption applied "except when such organizations may be engaged in business for profit".

It is also true that since the characteristics of many business operations are so distinct and appear in such variations, application of the law in order to reach reasonable conclusions must be made on a case by case basis. This principle surely applies to taxpayer's argument that it is not being provided with equal protection under the U. S. Constitution. That contention is apparently based on a claim that other organizations engage in similar transactions without having to pay a sales or use tax. We find no merit in this argument. The transactions in issue are not the occasional or "isolated" sales treated specifically under subsection (m) of Ark. stat. Ann. 84-1904 which provides an exemption for "gross receipts or gross proceeds derived from isolated sales made by an established business". Rather the transactions involved here appear to occur in a regular course of business and on a large scale.

As the taxpayer's claim that the transactions in issue are mere "donations", it seems elementary that reciprocal "donations" are in fact exchanges of whatever is donated and exchanges of money or goods and services for other necessities that persons and businesses all must have to survive, are not charitable transactions at all, but rather are expressions of our common every day means of assuring our continued existence. Moreover, the Arkansas Supreme Court long ago held that the taxing legislation does not require an ordinary sales transaction before the

tax is payable. *Republic Steel Corporation v. McCastlain*, 240 Ark. 979, 403 S.W.2d 90 (1966). The very language of subsections (c) and (d) or Ark. Stat. Ann. 84-1902 which defines "sale" and "gross proceeds", as quoted hereinabove, indicate without question that an "exchange" of tangible personal property or "property withdrawn" from stock for consumption or use by the business entity itself are taxable transactions.

The Arkansas Supreme Court has stated in several ways the most essential test for a claimed exemption. "A tax exemption must be strictly construed, and to doubt is to deny exemption." *Harvey v. Tyson's Foods, Inc.*, 252 Ark. 703, 480 S.W.2d 592 (1972). *Peterson Produce Company v. Cheney*, 237 Ark. 600, 374 S.W.3d 809 (1964). "The burden is on the claimant to establish its right to the exemption beyond a reasonable doubt." *Heath v. Westark Poultry Processing Corporation*, 259 Ark. 141, 531 S.W.2d 593 (1976). "There is a presumption favoring the taxing power of the state and the claimant has the burden to clearly establish any right to an exemption." *C.J.C. Corporation v. Cheney*, 239 Ark. 541, 390 S.W.2d 437 (1965).

Obviously the burden placed upon any taxpayer, be it church or charity, who attempts to prove entitlement to an exemption is quite severe and the members of this Board are bound to apply the tests required by the law. After a thorough review of the testimony and documentary evidence offered by both sides, the Board must admit to more than a reasonable doubt that the taxpayer is entitled to the claimed exemption. Too, since little issue was made as to the actual computation of the audits, we have no alternative but to affirm the assessment in its entirety with interest until the time of payment.

The file is to be returned to the appropriate section of the Department of Finance and Administration for further proceedings in accordance with applicable law and this decision. Dated 8/3/83. J. R. Nash, Administrative Law Judge.

IN THE CHANCERY COURT OF
CRAWFORD COUNTY, ARKANSAS

TONY & SUSAN ALAMO
FOUNDATION, INC. PLAINTIFFS

VS. CASE NO. E-83-487

CHARLES D. RAGLAND, COMMISSIONER
OF THE DEPARTMENT OF FINANCE AND
ADMINISTRATION, AND THE STATE OF
ARKANSAS DEPARTMENT OF FINANCE
AND ADMINISTRATION DEFENDANTS

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On this day this cause comes on for trial, Plaintiff appearing by its attorney, Mr. Roy Gean, Jr., and the Defendants appearing by their attorney, Joseph V. Svoboda, whereupon the cause is submitted to the Court upon the pleadings of the parties, testimony if witnesses, exhibits, statements by counsel and other evidence before the Court, and the Court, being well and sufficiently advised as to all matters of fact and law, doth find:

(1) That this Court has jurisdiction of the parties and the subject matter of this action pursuant to Ark. Stat. Ann. § 84-4721.

(2) That Plaintiff is the owner of six businesses, Alamo of Nashville in Alma; Alamo Restaurant; Alamo Kerr-McGee Gas & Quickie Market; Alamo Auto Repair & Transmission; Alamo Country Store & Fruit Stand and Alamo DX Service Station, and these six businesses are subject to the Arkansas Gross Receipts Act of 1941, as amended, being Ark. Stat. Ann. § 84-1901 et seq.

(3) Plaintiff had, on behalf of each of these six businesses, applied for and received from the defendant, Arkansas Retail Sales Permits under Ark. Stat. Ann. § 84-1913, that allowed these businesses to make untaxed purchases of tangible personal property which was then consumed by Plaintiff.

(4) That the defendant for the period of December 1, 1977 through August 31, 1980 performed Gross Receipts (Sales) audits on these six businesses which resulted in the assessments of tax, penalty and interest.

(5) The foregoing sales tax assessments do not violate the Plaintiff's Federal or State Constitutional rights to due process, equal protection or freedom of religion, nor are these assessments barred by the Statute of Limitations or the Doctrine of Laches.

(6) The foregoing six businesses are operated for profit and therefore Plaintiff is not entitled to the claimed exemption under Ark. Stat. Ann. § 1904 (c) and (d).

(7) That on August 5, 1983, there was an Administrative Decision, No. 81-108, issued pursuant to Ark. Stat. Ann. § 84-4720 which denied the Plaintiff's claim to various exemptions from sales tax and this Court affirms that administrative decision denying the claimed exemptions by Plaintiff subject to the following:

(a) During the audit period Alamo Restaurant transferred food to the Plaintiff's Foundation headquarters located in Dyer which Defendant taxed, based on Plaintiff's records, at $344,349.52. Plaintiff has argued that this value represents the retail value of the food and should be adjusted to show the actual wholesale cost which

is represented as being 30.92 percent of $344,349.52. The Court agrees that Plaintiff should only be taxed on the wholesale value of the food transferred to the Foundation headquarters in Dyer and the assessment of tax must therefore be reduced to $3,194.18 and the amount of interest adjusted accordingly to $1,907.61. The tax assessed on food consumed at Plaintiff's restaurant was correctly computed by Defendant at a value of $611,996.08, thus resulting in tax of $18,359.88, plus interest of $11,162.77.

(b) The amount of tax and interest through March 31, 1986, that is owed by Plaintiff for the remaining five (5) businesses is $24,112.41.

(c) The amount of penalty assessed against the Plaintiff is hereby set aside.

Defendant is granted judgment against Plaintiff in the sum of $58,736.85, which amount shall bear interest at the rate of ten percentum (10%) from June 1, 1986 until paid.

Dated September 12, 1986. Judge Bernice Kizer.

SUPREME COURT OF ARKANSAS

TONY AND SUSAN ALAMO FOUNDATION, INC. — APPELLANT

VS. NO. 87-119

CHARLES D. RAGLAND, COMMISSIONER, STATE OF ARKANSAS, DEPARTMENT OF FINANCE AND ADMINISTRATION — APPELLEE

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LAW OR CHANCERY MANDATE

Entered April 19, 1988

STATE OF ARKANSAS,

In the Supreme Court

BE IT REMEMBERED, That at a term of the Supreme Court of the State of Arkansas, begun and held at the Court Room in the City of Little Rock, on the 5th day, being the first Monday of October, A. D. 1987, amongst others were the following proceedings: On the 14th day of March, A. D. 1988, a day of said term:

87-119

TONY AND SUSAN ALAMO FOUNDATION, INC — APPELLANT

V. Appeal from Crawford Chancery E-83-487

CHARLES D. RAGLAND, COMMISSIONER, STATE OF ARKANSAS, DEPARTMENT OF FINANCE AND ADMINISTRATION — APPELLEE

This case came on to be heard upon the transcript of the record of the Chancery Court of Crawford County, and

was argued by solicitors, on consideration whereof it is the opinion of the court that there is no error in the proceedings and decree of said Chancery Court in this cause, and we affirm the decision that the transactions were sales; however, we reverse the chancellor's holding that some of the transactions should be taxed at the wholesale value.

It is therefore ordered and decreed by the Court that the decree of said Chancery Court in this cause be and the same is hereby in all things Affirmed on direct appeal, Reversed in Part on cross-appeal with costs for entry of a decree consistent with the opinion delivered herein.

It is further ordered and decreed that said appellee/cross-appellant recover of said appellant/cross-appellee all its costs in this Court in this cause expended, and have execution thereof.

Purtle, J., dissents in part. Dated April 18, 1988

## APPENDIX B

SUPREME COURT OF ARKANSAS

TONY AND SUSAN ALAMO
FOUNDATION, INC — APPELLANT

VS. — NO. 87-119

CHARLES D. RAGLAND, COMMISSIONER,
STATE OF ARKANSAS,
DEPARTMENT OF FINANCE
AND ADMINISTRATION — APPELLEE

---

OPINION OF THE SUPREME COURT
Opinion delivered March 14, 1988

APPEAL FROM CRAWFORD CHANCERY COURT
BERNICE L. KIZER, CHANCELLOR

(E-83-487)

AFFIRMED ON DIRECT APPEAL.

REVERSED IN PART ON CROSS-APPEAL

This is a case involving the Arkansas sales tax. The appellant is a California based, nonprofit, charitable institution authorized to do business in Arkansas and, incidental to its charitable purpose, operates several businesses in Arkansas. Six of those businesses are the focus of this lawsuit: a restaurant, a grocery store, two service stations, a clothing store, and an auto repair shop. The legal question is whether meals, clothing, goods and services furnished by these retail businesses to members, who are called associates, of the Alamo Foundation are sales under Arkansas law and subject to the sales tax. The

chancery court held generally that the transactions were sales. However, the court held that meals prepared by the restaurant and delivered to the foundation associates at Dyer, Arkansas, were taxable at wholesale, rather than retail value. No penalty was assessed for nonpayment.

On appeal Alamo makes four arguments: (1) the transactions are not sales; (2) if they are, they are exempt from the sales tax; (3) the Gross Receipts Act, as applied to these transactions, violates the religion clauses of the federal and state constitutions; and (4) the statutory scheme of the act is discriminatory and therefore unconstitutional.

The state appeals from the chancellor's decision valuing some of the sales at wholesale rather than retail, and the failure to impose a penalty.

We affirm the decision that the transactions were sales; the Alamo Foundation is unable to claim any exemption, and the constitutional arguments are meritless. We reverse the chancellor's holding that some of the transactions should be taxed at wholesale value and affirm the chancellor's finding that no penalty should be assessed.

The facts are esentially undisputed. Alamo operates these businesses for profit and obtained a retail tax permit as required by Ark. Code. Ann. § 26-52-201 (1987). From these businesses, the Alamo Foundation provides substantial goods and services to its "associates" and their families. "Associates" is the term applied by the Alamo Foundation to members who join or serve the foundation. The associates are also the "employees" of these businesses and other operations of the foundation. *See Tony and Susan Alamo Foundation v. Secretary of Labor,* 471 U.S. 290 (1985). Associates receive no salaries.

Instead, all or substantially all of their material needs are met by these businesses and other endeavors of the foundation. That includes the essentials of life: shelter, food, and clothing. For example, the Alamo Restaurant, during the audit period of September 1, 1977, through August 31, 1980, had total sales of approximately $2,300,000. Of that sum, $1,400,000 worth of food was sold to the general public; the balance of $956,345 was consumed by Alamo associates and their families. Some of this amount was transferred to foundation headquarters at Dyer for consumption there.

Alamo's first argument is that the transfer of meals, goods, and services to its associates is not a sale but merely a service to members of a religious organization; that is, if the foundation wants to give its goods and services to its people, it should not be taxed. We look to the definition of a sale in the Arkansas Gross Receipts Act. Ark. Code Ann. § 26-52-103(3)(A) defines a sale as "the transfer of either the title or possession . . . for a valuable consideration of tangible personal property . . ."

The question to us then is twofold: was there a transfer of title or possession of tangible personal property; if so, was valuable consideration given for the transfer? Undoubtedly, the transactions in question were transfers under this definition. The valuable consideration is the exchange of services and goods for the work of the associates.

We should mention that our decision in *Cook v. Southwest Hotels,* 213 Ark. 140, 209 S. W. 2d 469 (1948), is not controlling. In *Southwest Hotels,* the hotel occasionally provided meals for some of its employees, and we held that these transfers were not sales. The difference is

that the Alamo businesses make substantial and regular transfers to its associates. In fact, the Alamo restaurant prepared food specifically to feed its associates. It was not matter of extra food or waste, as it is sometimes called in the restaurant business, being consumed by employees.

Were the sales exempt under the act as Alamo contends? One claiming an exemption has the burden of establishing it beyond a reasonable doubt; legislation is strictly construed against such exemptions. *See Heath v. Westark Poultry Processing Corp.*, 259 Ark. 141, 531 S. W. 2d 593 (1975); *Hervey v. Tyson's Foods, Inc.*, 252 Ark. 703, 480 S. W. 2d 592 (1975). The simple fact that the Alamo Foundation is a religious and charitable organization does not exempt it from paying sales tax. The foundation argues that it should be exempt under Ark. Code Ann. § 26-52-401(1)(2) (Supp. 1987); however, none of these exemptions can be reasonably applied to Alamo's case. The act specifically provides that sales by churches and charitable organizations are generally exempt from sales tax *except* when these organizations are engaged in business for profit. Ark. Code Ann. § 26-52-401(2). Alamo does not dispute that it operates these businesses for profit.

The religion clauses of the United States and Arkansas Constitutions are the basis of the legal doctrine of separation of church and state, as well as the guarantee of the right to freely exercise one's religious beliefs without governmental interference. Religious organizations entering the commercial and secular world necessarily do so with the understanding that they no longer enjoy the constitutional protection afforded religious organizations.

There are no shields once they cross the line that separates church and state. They are no longer considered a church or religious organization, because they are not acting like one. In an analogous situation, we held that Harding College, a private religious college, was not exempt from real and personal property taxes on some business it operated. *Hilger v. Harding College*, 231 Ark. 686, 331 S. W. 2d 851 (1960).

In that case we said:

> The fact that the rents and revenue of a property owned by a charitable corporation are devoted to the purpose for which the corporation was organized, will not exempt such property from taxation. It is only when the property itself is *actually* and directly used for charitable purposes that the law exempts it from taxation . . . . "It is well settled that no one can exempt his property from taxation simply by the *exclusive use of that income* for public charity; for that is a matter which appeals to his own individual spirit of benevolence. It may be given today and withheld tomorrow. But a different rule prevails where the property is *directly* and *exclusively* used for that purpose."

The application of the sales tax to these transactions does not violate the religion clauses of the United States and Arkansas Constitutions. The Alamo Foundation elected to operate retail businesses for profit and, having made that choice, it must abide by the same rules under which all secular businesses operate, including taxation. *See United States v. Lee*, 455 U. S. 252 (1982).

Alamo finally argues that if it is not exempt from the sales tax, the statutory scheme of the Gross Receipts Act is discriminatory and therefore unconstitutional. This

argument is based on the fact that the act specifically exempts several organizations such as the Boy Scouts, Girl Scouts and 4-H Clubs from the sales tax. *See* Ark. Code Ann. § 26-52-401(7) - (10) (Supp. 1987). The foundation argues that by exempting some charitable organizations, but not its organization, the act is discriminating in violation of the equal protection and due process clauses of the United States and Arkansas Constitutions.

However, the appellant's argument overlooks the fact that the Arkansas law exempts these organizations from paying the sales tax on their purchase, not from collecting it on their sales. The appellant's position in this case concerns sales it makes—not purchases, and so Alamo's argument cannot succeed under this statute. (In its reply brief, the appellant acknowledges this discrepancy but does not deal with it).

We find no basis for the chancellor's decision that the meals transferred to the Alamo Foundation at Dyer should be taxed at wholesale value rather than retail value, and neither party has been able to produce any authority on the question. In *Republic Steel Corp. v. McCastlain, Comm'r,* 240 Ark, 979, 403 S. W. 2d 90 (1966), a case involving the use tax, we stated that transfers within a company were taxable at the value of the finished product (retail), rather than at the value of the raw materials used to make the finished product (wholesale). Since the legislature has made no provision for different treatment, neither do we. All the transfers should be taxed at retail value. We find no reason to disturb the chancellor's finding that no penalty should be assessed.

Affirmed on direct appeal. Reversed in part and affirmed in part on cross-appeal.

Purtle, J., dissents in part.

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JOHN I. PURTLE, Associate Justice
DISSENTING OPINION

Associates of the Foundation receive no salaries for the services they perform. They devote their full time to the Foundation, which, whether or not we approve of its beliefs and activities, is a religious organization. Most religious organizations would label such services "missionary work".

The food sales being taxed by the state are based on the food served without charge by the Foundation restaurant to the associates and other needy persons. Admittedly, more food was cooked than was expected to be sold to the public. However, no money whatsoever was received by the Foundation for this food.

The food in this case was no more of a sale than the food served daily at the Union Rescue Mission. The transfer of possession of personal property (i.e., food) is not the only necessary condition to find a sale has occurred. If it was, then the meals served at the Rescue Mission would also be subject to the sales tax. In order to tax a "transfer", valuable consideration must be given *in return for* the transfer. See Ark. Code Ann. § 26-52-103(1987). In the present case the associates of the Foundation devoted their time to the Foundation because of their religious beliefs, not because they would receive free meals in return for their services.

In my opinion we are discriminating against the Alamo Foundation by imposing a tax on food "sales" which is not imposed upon other religious and charitable organizations. The tax should not be imposed on these "sales" by the Foundation solely because of disagreement with the manner in which the religious organization carries out its beliefs.

SUPREME COURT OF ARKANSAS

TONY AND SUSAN ALAMO
FOUNDATION, INC. APPELLANT

VS. NO. 87-119

CHARLES D. RAGLAND, COMMISSIONER,
STATE OF ARKANSAS,
DEPARTMENT OF FINANCE
AND ADMINISTRATION APPELLEE

---

ORDER OF APRIL 18, 1988

Petition for Rehearing is denied. Purtle, Jr., would grant.

## APPENDIX C

Internal Revenue Code § 501(a) & (c)(3)

> (a) *Exemption From Taxation.* An organization described in subsection (c) or (d) or section 401(a) shall be exempt from taxation under this subtitle unless such exemption is denied under section 502 or 503 . . . .(c)(3) Corporation, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment, or for the prevention of cruelty to children or animals), no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation, (except as otherwise provided in subsection (6)), and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office.

Ark. Code Ann. § 26-18-406(a)

> *Judicial relief.* (a) Within thirty (30) days of the issuance of the notice and demand for payment of a deficiency in tax established by a final determination of the hearing officer or the director under § 26-18-405, a taxpayer may seek judicial relief from the final determination by . . . (2)(A) Filing with the director a bond in double the amount of the tax deficiency due and by filing suit within thirty (30) days thereafter to stay the effect of the director's determination. (B) The bond shall be subject to the condition that the taxpayer shall file suit within thirty (30) days after filing the bond, shall faithfully and diligently prosecute the suit to a final determination,

and shall pay any deficiency found by the court to be due and any court cost assessed against him.

Ark. Code Ann. § 26-52-103(a)(3)(A) & (4)

*Definitions.*

(a) The following words and phrases, except where the context clearly indicates a different meaning when used in this act, shall have the following meanings:

(3)(A) "Sale" is declared to mean the transfer of either the title or possession, except in the case of leases or rentals, for a valuable consideration of tangible personal property, regardless of the manner, method, instrumentality, or device by which the transfer is accomplished.

(4) "Gross receipts" or "gross proceeds" means the total amount of consideration for the sale of tangible personal property and such services as are herein specifically provided for, whether the consideration is in money or otherwise, without any deduction on account of the cost of the properties sold, labor service performed, interest paid, losses, or any expenses whatsoever. However, the term "gross receipts" or "gross proceeds" shall not include the manufacturer's federal excise taxes levied upon articles if the manufacturer's federal excise taxes are separately stated or separately billed. The term "gross proceeds" or "gross receipts" shall include the value of any goods, wares, merchandise, or property withdrawn or used from the established business or from the stock in trade of the established reserves for consumption or use in such business or by any other person.

Ark. Code Ann. § 26-52-301(1) & (3) (C) (i)

*Tax levied.* There is levied an excise tax of three percent (3%) upon the gross proceeds or gross receipts derived from all sales to any person of the following:

(1) Tangible personal property:

(3)(C)(i) Service of alteration, addition, cleaning, refinishing, replacement, and repair of motor vehicles, aircraft, farm machinery and implements, motors of all kinds, tires and batteries, boats, electrical appliances and devices, furniture, rugs, upholstery, household appliances, television and radio, jewelry, watches and clocks, engineering instruments, medical and surgical instruments, machinery of all kinds, bicycles, office machines and equipment, shoes, tin and sheetmetal, mechanical tools, and shop equipment.

Ark. Code Ann. § 26-52-401(2), (3), (4), (8), (9), (10) & (11)

*Exemptions for various products and services.* There is specifically exempted from the tax imposed by this act the following:

(2) The gross receipts or gross proceeds derived from the sale of tangible personal property or services by churches, except where the organizations may be engaged in business for profit;

(3) The gross receipts or gross proceeds derived from the sale of tangible personal property or service by charitable organizations, except where the organizations may be engaged in business for profit;

(4) Gross receipts or gross proceeds derived from the sale of food in public, common, high school, or college cafeterias and lunch rooms operated primarily for teachers and pupils, not operated primarily for the public and not operated for profit;

(8) Gross receipts or gross proceeds derived from the sale of tangible personal property including but not limited to office supplies; office equipment; program items at camp such as bows, arrows, and rope; rifles for rifle range and other rifle items; food for camp; lumber and supplies used in camp

maintenance; camp equipment; first aid supplies for camp; the leasing of cars used in promoting scouting; or services to the Boy Scouts of America chartered by the United States Congress in 1916 or the Girl Scouts of the United States of America chartered by the United States Congress in 1950 or any of the Scout Councils in the State of Arkansas;

(9)(A) Gross receipts or gross proceeds derived from sales of tangible personal property or services to the Boys Clubs of America chartered by the United States Congress in 1956 or any local councils or organizations of the Boys Clubs of America; or,

(B) Gross receipts or gross proceeds derived from sales of tangible personal property or services to the Girls Clubs of America or any local councils or organizations of the Girls Clubs of America;

(10) Gross receipts or gross proceeds derived from sales of tangible personal property or services to the Poets' Roundtable of Arkansas;

(11) Gross receipts or gross proceeds derived from sales of tangible personal property or services to 4-H Clubs and FFA Clubs in this state, to the Arkansas 4-H Foundation, the Arkansas Future Farmers of America Foundation, and the Arkansas Future Farmers of America Association.

Ark. Code Ann. § 26-52-501(b) & (c)

*Preparation of Returns—Payment of Tax.*

(b)(1) For the purpose of ascertaining the amount of tax payable under this act, it shall be the duty of all taxpayers on or before the twentieth day of each month to deliver to the Director of the Department of Finance and Administration, upon forms prescribed and furnished by him, returns under oath showing the total combined gross receipts or gross proceeds derived from all taxable sales and the total combined gross receipts or gross proceeds derived from all

nontaxable sales during the preceding calendar month.

(2) The returns shall show further information as the director may require to enable him to compute correctly and collect the tax levied.

(c) In addition to the information required on returns, the director may request and the taxpayer must furnish any information deemed necessary for a correct computation of the tax levied.

(2)

No. 88-117

Supreme Court, U.S.
FILED
AUG 12 1988
JOSEPH F. SPANIOL, JR.
CLERK

In the

# Supreme Court of the United States

OCTOBER TERM 1987

Tony and Susan Alamo Foundation, Inc. ..... *Petitioner*

v.

Charles D. Ragland, Commissioner of the Department of Finance and Administration, and the State of Arkansas, Department of Finance and Administration ..... *Respondents*

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF ARKANSAS

## RESPONSE OPPOSING PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

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No. 88-117

# In the Supreme Court of the United States

OCTOBER TERM 1987

Tony and Susan Alamo Foundation, Inc. ..... *Petitioner*

v.

Charles D. Ragland, Commissioner of the Department of Finance and Administration, and the State of Arkansas, Department of Finance and Administration ..... *Respondents*

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF ARKANSAS

RESPONSE OPPOSING PETITION
FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF ARKANSAS

## STATEMENT OF THE CASE

The Respondent, Charles D. Ragland, Commissioner of Revenues, Department of Finance and Administration for the State of Arkansas, is responsible for the administration of the Arkansas Gross Recepits (Sales) Tax. The Petitioner, is a non-profit corporation under the laws of the State of California authorized to conduct its affairs as a non-profit corporation in the State of Arkansas. The Petitioner operates six for profit businesses: 1) the Alamo of Nashville in Alma, 2) the Alamo Restaurant, 3) Alamo Country Store & Fruit Stand, 4) the Alamo Kerr-McGee Gas Station, 5) the Alamo DX Service Station, and 6) Alamo Auto Repair & Transmission. Profits

derived from these businesses are utilized by Petitioner to support itself, its Associates or members, and its ministry. All six businesses applied for and received Arkansas Retail Sales Tax Permits. These permits enabled the six businesses to purchase items for resale without initially paying the Arkansas Gross Receipts Tax. All six businesses thereafter charged, collected and remitted Arkansas sales tax on all sales made to individuals or businesses not connected with Petitioner. An audit of Petitioner's businesses was conducted for the period September 1, 1977 through August 31, 1980. The Respondent assessed tax against Petitioner on the value of transfers of various foods, clothing, gasoline, auto repairs and other items made to Petitioner's members or itself. Specific taxable transfers included: (1) charges for parts and services from the Alamo Auto Repair and Transmission for repair to Petitioner's vehicles; (2) distribution of various foodstuffs from the Alamo Country Store and Fruit Stand to employees of Petitioner; (3) clothing delivered by Alamo of Nashville to employees of Petitioner; (4) transfer by the Alamo DX Service Station of tires, batteries, and other auto accessories to Petitioner's businesses; (5) delivery of food for consumption by Petitioner's employees from the Alamo Restaurant; and (6) sales of convenience store items such as cokes, candy, sandwiches, belts, hats, etc. to Petitioner's employees by the Alamo Kerr McGee Gas and Quickie Market. Respondent imposed tax liability on two theories: (1) goods or services transferred by the Petitioner to its members were sales as defined by the Arkansas Gross Receipts (Sales) Tax and (2) the transfer of tangible personal property from Petitioner's businesses to a member was a withdrawal from stock under the same law.

## SUMMARY OF ARGUMENT

A.

The six businesses operated by the Petitioner are not exempt from taxation under Arkansas law where the church or charitable organization is engaged in business for profit. By making application for and obtaining a sales tax permit allowing the tax free purchase of merchandise for resale, Petitioner's businesses were engaged in business for profit. Transfers of food, clothing, and other items to Petitioner's Associates are sales or withdrawals from stock and therefore taxable under the Arkansas Gross Receipts (Sales) Tax.

B.

The Arkansas Legislature has wide latitude in adopting tax laws and exemptions therefrom. The taxation of commercial businesses operated for profit by Petitioner is a legitimate exercise of the power to levy taxes.

C.

This Court has previously considered Petitioners arguments that governmental imposed record keeping requirements for its commercial activities infringes on Petitioners rights under the 1st Amendment Free Exercise of Religion Clause and rejected the same. *Tony and Susan Alamo Foundation v. Secretary of Labor*, 471 U.S. 290 (1985), at page 303.

## REASONS FOR DENYING THE WRIT

### A.

### THE ARKANSAS GROSS RECEIPTS TAX ACT WAS CONSTITUTIONALLY APPLIED TO THE ALAMO FOUNDATION'S COMMERCIAL BUSINESS ENTERPRISES. TRANSFERS OF FOOD, CLOTHING, AND OTHER ITEMS TO ASSOCIATES ARE SALES OR WITHDRAWALS FROM STOCK AND PROPERLY TAXABLE UNDER ARKANSAS LAW.

The State of Arkansas has imposed a sales tax under Ark. Code Ann. §26-52-401(2) (1987) upon churches engaged in business for profit. The statute provides:

> Exemptions for various products and services.
>
> > There is specifically exempted from the tax imposed by this Act the following:
> >
> > 2) the gross receipts or gross proceeds derived from the sale of tangible personal property or services by churches, except where the organization may be engaged in business for profit;

Further, a business in the State of Arkansas is liable for taxes on withdrawals from stock. Ark. Code Ann. §26-52-103(a) (4) (1987), subjects a business to sales tax, on:

> " . . . The value of any goods, wares, merchandise, or property withdrawn or used from the established business or from the stock in trade of the established reserves for consumption or use in such business or by any other person."

The Alamo Foundation carries on commercial activities by operating the six businesses involved in the present litigation and others in the State of Arkansas. (See *Tony and Susan Alamo Foundation v. Secretary of Labor*, 471

U.S. 290 (1985), at page 292). These businesses are organized and operated to generate revenues which are used to foster and continue the religious purposes of the corporation. The Arkansas Legislature, for whatever reason, chose to limit the tax exemption available to a church by requiring the church not be engaged in business for profit. Petitioner's businesses are engaged in business for profit, removing them from the tax exempt status they might otherwise be entitled to under Arkansas law.

The United States Supreme Court in the case of *United States v. Lee*, 455 U.S. 252, 102 S.Ct. 1051, 71 L.Ed.2d 127 (1982), followed several principles applicable here. The Court stated:

> "Not all burdens on religion are unconstitutional . . . the State may justify a limitation on religious liberty by showing that it is essential to accomplish an overriding governmental interest." (455 U.S., at 257.)

Petitioners challenges the constitutionality of the Arkansas Gross Receipts (Sales) Tax scattering allegations purporting to show violations of Freedom of Religion, Equal Protection, and Due Process by the State of Arkansas. Petitioners claims that taxation imposed on its commercial businesses somehow violates its ability to exercise its religion are baseless. The Arkansas tax laws the Petitioner finds offensive don't regulate Petitioners beliefs or interfere with Petitioners right to carry on its ministry at its businesses in Arkansas. Arkansas tax law doesn't impede Petitioner's religious practices. Rather the tax imposed under Arkansas law is justifiable in terms of a legitimate governmental aim.

Petitioner alleges that the application of the Arkansas Gross Receipts (Sales) Tax to its noncommercial internal transfers violates the First Amendment to the U.S. Constitution under the Free Exercise of Religion Clause

and/or the Establishment Clause. Petitioner essentially alleges that the application of the Arkansas Gross Receipts (Sales) Tax will impair its efforts to attract volunteers or impact on unspecified religious freedoms existing at Petitioners commercial businesses. Petitioner's argument evades the key point that there is no impact on Petitioners religious liberty. Even conceding for a moment some minimal burden might exist to Petitioner's exercise of religious freedom in the commercial environment, other compelling governmental interests would sustain the constitutionality of the offending legislation.

In the present case, the overriding governmental interest is the integrity of the Arkansas sales tax system, a factor the Petitioner fails to address. As previously recognized by this Court, a tax system can not function if continually opened to challenges that the tax system somehow infringes on the taxpayers religious belief. (455 U.S., at 260.) Petitioner presents no new issues not previously heard and rejected by this Court. Consequently, the Petition for a Writ of Certiorari should be denied.

This Court previously in examining the religious implications concerning withholding of social security taxes concluded that:

> "Because the broad public interest in maintaining a sound tax system is of such a high order, religious belief in conflict with the payment of taxes affords no basis for resisting the tax." (455 U.S., at 260)

The Court finally stated that:

> "When followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity." (455 U.S., at 261)

The State of Arkansas has a legitimate and overriding governmental interest in maintaining a sound sales tax system. The Arkansas Gross Receipts (Sales) Tax law is rationally related to accomplishing this purpose. It has no impact on Petitioner's religious freedom. The law does, however, impact commercial for profit activities by a church or religious organization which have invaded the market place. As such, it is a legitimate exercise of governmental authority. In *McGowan v. Maryland*, 366 U.S. 420 (1961), this Court stated:

> "Although no precise formula has been developed, the Court has held that the Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the States objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it."

Petitioner has *voluntarily* entered the commercial business world to make money to support itself. It has *voluntarily* obtained retail sales tax permits to allow it to purchase items for resale and charge tax to customers. Petitioner now seeks to limit the otherwise constitutional application of the sales tax to its Members as an infringement on 1st and 14th Amendment grounds. Under the principles announced in *Lee* and *McGowan*, supra, Petitioners constitutional infringement claims on Freedom of Religion, Equal Protection, and Due Process grounds are without foundation.

It is readily apparent that transfers of various foods, clothing, gasoline, auto repairs, and other items made to petitioner's Associates are sales and therefore taxable

under Ark. Code Ann. §26-52-401(2) (1987). A "sale" for purposes of the Arkansas Gross Receipts (Sales) Tax is, "the transfer of either the title or possession . . . for a valuable consideration of tangible personal property . . . ." Ark. Code Ann. §26-52-103(3)(A) (1987). The transfers in question were sales under this definition even though no money was exchanged between Petitioner and its Associates. This Court in a prior case involving Petitioner reached the conclusion that transfer of money (i.e. salary, wages) was not necessary for an exchange to occur under the "economic reality" test of employment, *Tony and Susan Alamo Foundation v. Secretary of Labor*, 455 U.S. 290 (1985), at 293. A similar result was also reached previously in the present situation by the Arkansas Supreme Court where it was concluded, "the valuable consideration is the exchange of services and goods for the work of the Associates." *Tony and Susan Alamo Foundation v. Ragland*, 295 Ark. 12 (1988), at 15. Applying the rationale of the "economic reality" test to the present constitutional chalienge, no real issue exists that the transfers of goods or services should not be taxable. If for argument, a transfer were found not to exist, a tax liability would still exist under Arkansas law on the theory Petitioner was withdrawing tangible personal property from stock [Ark. Code Ann. §26-52-103(a) (4) ].

For the foregoing reasons no constitutional question exists which this Court should address. Consequently, the Petition for Writ of Certiorari should be denied.

B.

THE IMPOSITION OF THE ARKANSAS GROSS RECEIPTS TAX UPON CHURCH BUSINESSES OPERATED FOR PROFIT IS NOT A DENIAL OF EQUAL PROTECTION UNDER THE ARKANSAS AND UNITED STATES CONSTITUTION.

The Arkansas legislature has wide latitude in adopting tax imposition statutes and exemptions therefrom. In *Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522, 79 S.Ct. 437, 3 L.Ed.2d 480 (1959) the Court addressing the denial of equal protection argument advanced by a taxpayer, stated the "rational basis test" to be utilized in reviewing the constitutionality of legislation. The Court said:

> " . . . It has long been settled that a classification, though discriminatory, is not arbitrary nor violative of the Equal Protection Clause of the Fourteenth Amendment if any state of facts reasonably can be conceived that would sustain it." 358 U.S. at page 528.

Under this test, legislation is constitutional if it is rationally related to achieving a legitimate government objective.

In reviewing an exemption from the Alabama Unemployment Compensation Act, this Court further stated:

> "It is inherent in the exercise of the power to tax that a state be free to select the subjects of taxation and to grant exemptions." *Carmichael v. Southern Coal and Coke Company*, 301 U.S. 495, 57 S.Ct. 868, 81 L.Ed.2d 1245 (1931), at 301 U.S. page 509.

In order for the Petitioner to succeed in its constitutional challenge herein, it must prove that the violative law is not rationally related to achieving any legitimate objective of state government under any reasonably conceivable state of facts. As a readily apparent rational basis exists for the imposition of a sales tax on a church operated business for profit (i.e., a valid state objective in collecting revenues and regulating commercial sales), Petitioners legal arguments must necessarily fail. The Petitioner will be unable to show that the offensive legislation is a product of an utterly arbitrary and

capricious government which is devoid of any deliberate and lawful purpose. To this end, there is presented no Constitutional issue demanding review by this Court.

## CONCLUSION

For the foregoing reasons, a Writ of Certiorari should not be issued to review the decision of the Arkansas Supreme Court and the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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